

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

BRANDY K. JOHNSON,

Claimant,

v.

DAIRY QUEEN,

Employer,

and

LIBERTY NORTHWEST INSURANCE  
CORPORATION,

Surety,

Defendants.

**IC 2005-511793**

**IC 2006-517411**

**FINDINGS OF FACT,  
CONCLUSION OF LAW,  
AND RECOMMENDATION**

Filed December 14, 2007

**INTRODUCTION**

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Michael E. Powers, who conducted a hearing in Boise, Idaho, on July 11, 2007. Sam Johnson of Boise (no relation to Claimant) represents Claimant. Kent W. Day of Boise represents Defendants. Oral and documentary evidence was submitted at the hearing. Two post-hearing depositions were taken and the parties submitted post-hearing briefs. The matter came under advisement on October 19, 2007, and is now ready for decision.

**ISSUE**

By agreement of the parties at hearing, the issue to be decided is whether Claimant is entitled to reasonable and necessary medical care as provided for by Idaho Code § 72-432, and the extent thereof.

**FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION - 1**

## **CONTENTIONS OF THE PARTIES**

It is undisputed that Claimant has a history of low back problems including a lumbar surgery in September 2004, as the result of a non-work-related motor vehicle accident in January of 2004. It is further undisputed that Claimant sustained injuries involving her low back while working for Employer in April of 2005 and July of 2006. A lumbar fusion has been proposed and the parties disagree as to which injuries and/or other factors resulted in the need for the proposed surgery.

Claimant relies on the opinion of her treating doctor who opines that her current need for lumbar surgery is due to the April 2005 injury. Defendants rely on the opinion of their independent medical evaluation (IME) doctor who concludes that the need for surgery is related to degenerative conditions and sequelae of the previous surgery. Defendants also rely on the opinion of a peer review radiologist who asserts that the diagnostic studies do not support the need for a fusion.

## **EVIDENCE CONSIDERED**

The record in this matter consists of the following:

1. The testimony of Claimant and her sister, Amber Jean Bibbey, taken at hearing;
2. Claimant's Exhibits 1-8;
3. Defendants' Exhibits A-N; and
4. The post-hearing depositions of Joseph Verska, M.D., taken by Claimant on July 31, 2007, and Charles P. Schneider, M.D., taken by Defendants on August 13, 2007. The objections made during the taking of the above depositions are overruled.

After having considered all the above evidence and the briefs of the parties, the Referee submits the following findings of fact and conclusion of law for review by the Commission.

## **FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION - 2**

## **FINDINGS OF FACT**

1. Claimant was born on June 25, 1976, and was 31 years old at the time of the hearing. Claimant has been employed by Dairy Queen as a cake decorator since 2001, but was working reduced hours at the Dairy Queen order window at the time of hearing.

2. The first record of Claimant's back complaints involves a work-related injury of 1997 when Claimant lifted a client into a van while working for a previous employer. Claimant sustained another injury to her low back in 2001 as the result of a motor vehicle accident (MVA) for which she treated intermittently with Robin King, D.C., from April of 2001 through October of 2003.

3. Claimant was involved in a second MVA on January 28, 2004, at which time she was approximately 7 months pregnant. Claimant initially treated with Dr. King but was referred to Joseph Verska, M.D., after continued lumbar spine and lower extremity complaints.

4. A lumbar MRI of June 28, 2004, revealed a broad-based central and left central disc herniation. Claimant underwent lumbar surgery on September 22, 2004, at the direction of Dr. Verska, in the form of a microdiscectomy at L5-S1 on the right side.

5. Claimant reports a full recovery from the September 2004 surgery. Dr. Verska's records reflect that, as of November 2, 2004, Claimant's leg symptoms were 90% improved, the incision had completely healed, strength in the lower extremities was equal, and that Claimant was neurologically stable. Claimant did not return to Dr. Verska from November 2, 2004, until June 6, 2005.

6. Claimant saw Dr. King on April 11, 2005, for evaluation of her cervical spine and frequent headaches. The chart note indicates that the previous lumbar surgery went well, but that

Claimant experienced residual intermittent right sciatica and occasional numbness in her right great toe.

7. On April 12, 2005, Claimant slipped and fell in the walk-in cooler at Dairy Queen when she was going to get thawed butter cream to decorate cakes. Claimant landed on the left side of her buttocks, injuring her left shoulder, buttocks and low back. Claimant declined immediate medical attention but initiated treatment with Dr. King on April 25, 2005, and subsequently returned to Dr. Verska.

8. A lumbar MRI of June 28, 2005, revealed evidence of the prior surgery and an L5-S1 small central/left disc protrusion with an annular tear. The annular tear was not present on the previous MRI of June 28, 2004.

9. Claimant was evaluated on April 4, 2006, by Michael Sant, D.O., at the referral of Surety. Dr. Sant opined that the annular tear was of unknown etiology and that Claimant's subjective symptoms did not correlate with the radiographic findings. He certified maximum medical improvement with regard to the injury of April 12, 2005, and assigned a 6% permanent partial impairment rating with 75% apportioned to pre-existing conditions. Claimant reported ongoing symptoms at the time of evaluation.

10. On July 5, 2006, Claimant was lifting a frozen tub of butter cream from a top shelf in the walk-in cooler when she twisted and felt like she "tweaked" her back.

11. Lumbar MRIs were performed on January 19, 2006, and July 26, 2006. Both MRIs showed disc desiccation at L5-S1 with moderate posterior annular bulging and a right posterior paramedian annular tear.

12. Claimant pursued conservative care in the form of physical therapy, epidural steroid injections, and medication at the direction of Dr. Verska, without significant improvement. In August of 2006, Dr. Verska felt Claimant was a candidate for a lumbar fusion. Dr. Verska recommended a discogram to confirm the pain generator and a psychological evaluation to rule out somatization.

13. Claimant underwent a psychological evaluation by Michael H. McClay, Ph.D., on August 9, 2006, at which time Claimant's psychological profile suggested possible psychophysiologic reactions to pain and symptom magnification. Risk factors for surgery included Claimant's psychological orientation and smoking habit. Biofeedback was recommended and six sessions were performed through September 27, 2006.

14. Charles P. Schneider, M.D., evaluated Claimant on October 17, 2006, at the request of Surety. Dr. Schneider concluded that Claimant's annular tear was associated with her long-standing back pain and that the lifting injury of July 5, 2006, resulted in a lumbar strain and only a temporary exacerbation of her underlying problem. He agreed that a discogram would be appropriate but that positive discogram findings would be related to her previous injury and not the injury of July 5, 2006.

15. Dr. Schneider's reports make no reference to the injury of April 12, 2005. However, Dr. Schneider addressed the April 2005 injury in his post-hearing deposition. He testified that the need for a lumbar fusion was due to the degeneration of the disc at L5-S1 associated with the 2004 surgery, and that it would be speculative to assign causation to the April 2005 injury. Dr. Schneider testified that it was a possibility, rather than a probability, that the April 2005 injury accelerated or exacerbated Claimant's condition.

16. A discogram was performed in January of 2007, which isolated the L5-S1 disc level as the pain generator.

17. A peer review was performed on June 11, 2007, by radiologist, David Giles, M.D., at the request of Surety. Dr. Giles was provided with medical records as well as all radiographic and imaging studies. He concluded that the proposed lumbar fusion was unnecessary treatment in light of the absence of nerve root compression or lumbar instability. He commented that the annular tear was improperly diagnosed since the prior surgery on the disc required that the annulus be incised. He viewed the annular tear as a post-operative annular discontinuity with a radial annular fissure.

18. Dr. Verska concluded that Claimant was cleared for surgery from a psychological standpoint and that the discogram corroborated the need for a decompression fusion at L5-S1. Dr. Verska disagrees with the opinion of Dr. Schneider with regard to causation and opines that, on a more probable than not basis, Claimant's discogenic pain and need for a fusion are related to her annular tear which resulted from her work injury of April 2005, and was aggravated by her work injury of July 2006.

### **DISCUSSION AND FURTHER FINDINGS**

Idaho Code § 72-432(1) obligates an employer to provide an injured employee reasonable medical care as may be required by his or her physician immediately following an injury and for a reasonable time thereafter. It is for the physician, not the Commission, to decide whether the treatment is required. The only review the Commission is entitled to make is whether the treatment was reasonable. *See, Sprague v. Caldwell Transportation, Inc.*, 116 Idaho 720, 779 P.2d 395 (1989).

19. Both Dr. Verska and Dr. Schneider agree that Claimant is a candidate for a lumbar fusion at L5-S1. Both doctors agree that the injury of July 2006 was a relatively minor aggravation of a pre-existing condition. The disagreement of the experts is that Dr. Verska relates the need for surgery to an annular tear caused by the injury of April 2005, and Dr. Schneider relates the need for surgery to degenerative disc disease at L5-S1 and residual effects from Claimant's 2004 surgery. Both explanations are plausible and consistent with the diagnostic studies.

20. The opinion of Dr. Verska is more persuasive than the opinion of Dr. Schneider because Dr. Verska was in the unique position of providing evaluation and treatment to Claimant both before and after the April 2005 injury.

21. The opinion of Dr. Giles regarding Claimant's current diagnoses and need for surgical intervention is inconsistent with the opinions of both Dr. Verska and Dr. Schneider. Dr. Verska and Dr. Schneider are practicing surgeons who agree that surgical intervention in the form of a lumbar fusion is appropriate treatment for Claimant. The opinion of Dr. Giles is given less weight than the other medical opinions since Dr. Giles is not a surgeon.

22. The fact that Claimant was more susceptible to an injury in April of 2005, due to her previous surgery, does not preclude a finding of compensability and entitlement to medical treatment since the aggravation of Claimant's pre-existing condition was significant enough to result in additional disability and the need for a lumbar fusion.

23. A preexisting disease or infirmity of the employee does not disqualify a workers' compensation claim if the employment aggravated, accelerated, or combined with the disease or infirmity to produce the disability for which compensation is sought. An employer takes the employee as it finds him or her. Wynn v. J.R. Simplot Co., 105 Idaho 102, 666 P.2d 629 (1983). A claimant seeking compensation for the aggravation of a preexisting condition must prove that

an accident as defined by Idaho Code § 72-102(17) aggravated the preexisting condition. Nelson v. Ponsness-Warren IDGAS Enterprises, 126 Idaho 129, 879 P.2d 592 (1994).

24. Claimant has met her burden of proof to establish that her slip and fall injury of April 12, 2005, aggravated her pre-existing lumbar condition and she is entitled to medical treatment, including the proposed lumbar fusion at L5-S1.

#### **CONCLUSION OF LAW**

Claimant is entitled to reasonable and necessary medical care as provided for by Idaho Code § 72-432, including the proposed lumbar fusion at L5-S1.

#### **RECOMMENDATION**

The Referee recommends that the Commission adopt the foregoing findings of fact and conclusion of law and issue an appropriate final order.

DATED this \_\_5<sup>th</sup>\_\_ day of \_\_December\_\_ 2007.

INDUSTRIAL COMMISSION

\_\_\_\_/s/\_\_\_\_\_  
Michael E. Powers, Referee

ATTEST:

\_\_\_\_/s/\_\_\_\_\_  
Assistant Commission Secretary



## CERTIFICATE OF SERVICE

I hereby certify that on the \_14<sup>th</sup>\_ day of \_\_December\_\_ a true and correct copy of **FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon:

SAM JOHNSON  
405 S EIGHTH ST STE 250  
BOISE ID 83702

KENT W DAY  
PO BOX 6358  
BOISE ID 83707-6358

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\_\_\_\_/s/\_\_\_\_\_

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BRANDY K. JOHNSON,

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**ORDER**

Filed December 14, 2007

Pursuant to Idaho Code § 72-717, Referee Michael E. Powers submitted the record in the above-entitled matter, together with his proposed findings of fact and conclusion of law to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendation of the Referee. The Commission concurs with this recommendation. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusion of law as its own.

Based upon the foregoing reasons, IT IS HEREBY ORDERED that:

1. Claimant is entitled to reasonable and necessary medical care as provided for by Idaho Code § 72-432, including the proposed lumbar fusion at L5-S1.
2. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all issues adjudicated.

DATED this \_\_14<sup>th</sup>\_\_ day of \_\_December\_\_\_\_, 2007.

INDUSTRIAL COMMISSION

\_\_\_\_/s/\_\_\_\_\_  
James F. Kile, Chairman

\_\_\_\_/s/\_\_\_\_\_  
R. D. Maynard, Commissioner

\_\_\_\_/s/\_\_\_\_\_  
Thomas E. Limbaugh, Commissioner

ATTEST:

\_\_\_\_/s/\_\_\_\_\_  
Assistant Commission Secretary

### **CERTIFICATE OF SERVICE**

I hereby certify that on the \_\_14<sup>th</sup>\_\_ day of \_\_December\_\_, 2007, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following persons:

SAM JOHNSON  
405 S EIGHTH ST STE 250  
BOISE ID 83702

KENT W DAY  
PO BOX 6358  
BOISE ID 83707-6358

ge

\_\_\_\_/s/\_\_\_\_\_